# STATE OF MICHIGAN

# COURT OF APPEALS

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| ELAINE KARN,<br><br>Plaintiff-Appellant, | UNPUBLISHED<br>May 22, 2007 |
| v | No. 273111<br>Ingham Circuit Court |
| BARYAMES CLEANERS, INC.,<br><br>Defendant-Appellee. | LC No. 05-001254-NO |

Before: White, P.J., and Saad and Murray, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition in this premises liability case. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

At approximately 5:45 p.m. on December 9, 2002, plaintiff went to defendant's store in Williamston to pick up her dry cleaning. The weather was clear, and no snow or ice was on the ground. Plaintiff entered the store, retrieved her dry cleaning, and exited the store. As plaintiff returned to her vehicle, she walked over the same sidewalk she had used to enter the building, but closer to the building. As plaintiff passed a window, she slipped on a patch of ice on the sidewalk and fell to the ground, sustaining injuries.

Plaintiff filed suit alleging that she was on defendant's premises as a business invitee, and that defendant negligently failed to inspect the premises for unsafe conditions, to maintain the premises in a reasonably safe manner, to repair the premises within a reasonable time, and to warn of the unsafe condition on the premises. In particular, plaintiff alleged that defendant negligently failed to repair a draining eaves trough, and that this condition caused the ice to form on the sidewalk.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that it owed no duty to plaintiff because the condition of which she complained was open and obvious, and presented no special aspects that made it unreasonably dangerous in spite of its open and obvious nature. In response, plaintiff contended that at a minimum, a question of fact existed regarding whether the ice was open and obvious, especially under circumstances in which the weather was clear and dry and ice would not be expected. Plaintiff also argued that defendant's failure to remedy the situation made the ice unreasonably dangerous.

The trial court granted defendant's motion for summary disposition. The trial court held that the evidence established that the condition was open and obvious; in addition, the trial court found that the condition was not unreasonably dangerous because plaintiff had an alternative route available to her.

We review the trial court's decision on a motion for summary disposition de novo. In reviewing the decision on a motion brought pursuant to MCR 2.116(C)(10), we must review the record evidence and all reasonable inferences drawn therefrom in a light most favorable to the nonmoving party, and decide whether a genuine issue of material fact exists. *Trepanier v Nat'l Amusements, Inc*, 250 Mich App 578, 582-583; 649 NW2d 754 (2002).

A possessor of land has a duty to exercise reasonable care to protect an invitee from an unreasonable risk of harm caused by a dangerous condition on the land. The duty to protect an invitee does not extend to a condition from which an unreasonable risk of harm cannot be anticipated, or from a condition that is so open and obvious that an invitee could be expected to discover it for himself. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995).

The open and obvious doctrine attacks the duty element that a plaintiff must establish in a prima facie negligence case. *Id*. at 612. Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered the danger upon casual inspection. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993). However, if special aspects of a condition make even an open and obvious risk unreasonably dangerous, a possessor of land must take reasonable precautions to protect an invitee from that risk. If such special aspects are lacking, the open and obvious condition is not unreasonably dangerous. *Lugo v Ameritech Corp*, 464 Mich 512, 517-519; 629 NW2d 384 (2001).

Plaintiff's fall occurred shortly before 6:00 p.m. on December 9, 2002. Plaintiff indicated that although it was dark when she fell, she could see her vehicle. Plaintiff acknowledged that she was not watching where she was walking as she walked toward her vehicle, and thus did not see the patch of ice before she slipped. However, three persons who assisted plaintiff after she fell stated that they observed the patch of ice without difficulty when they approached the area. Because the test to determine whether a danger is open and obvious is objective, we look not to whether a particular plaintiff knew or should have known of the hazardous condition, but to whether a reasonable person in the plaintiff's position would have foreseen the danger. *Joyce v Rubin*, 249 Mich App 231, 238-239; 642 NW2d 360 (2002).

In *Kenny v Kaatz Funeral Home*, 472 Mich 929; 697 NW2d 526 (2005), our Supreme Court reversed this Court's decision in *Kenny v Kaatz Funeral Home*, 264 Mich App 99; 689 NW2d 737 (2004), adopted the dissenting opinion in that case, and held that a snow-covered, icy parking lot presents an open and obvious danger, especially under circumstances in which the plaintiff saw other persons slipping. The dissenting opinion in this Court's decision noted that the presence of both snow and ice is a common occurrence during the winter in Michigan. 264 Mich App at 121 (Griffin, J., dissenting). Thus, our Supreme Court's decision in *Kenny*, *supra*, stands for the proposition that ice is a common occurrence during the winter in Michigan and, absent special aspects, is an open and obvious danger.

Plaintiff failed to raise a genuine issue of fact regarding whether the patch of ice was open and obvious. Plaintiff would have noticed the patch of ice had she been watching where she was walking. See *Millikin v Walton Manor Mobile Home Park, Inc*, 234 Mich App 490, 497; 595 NW2d 152 (1999). The trial court properly determined as a matter of law that the hazard posed by the patch of ice was open and obvious.

Furthermore, plaintiff has not established the existence of special aspects that made the patch of ice unreasonably dangerous in spite of its open and obvious nature. Plaintiff alleged that the condition was unreasonably dangerous because defendant failed to repair an eaves trough or a downspout that allowed the ice to form; however, the photograph of the area in which plaintiff fell does not depict either a downspout or an eaves trough. Moreover, falling on a patch of ice does not present a sufficiently severe risk of injury to constitute a special aspect under *Lugo, supra*. See *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1, 6-7; 649 NW2d 392 (2002) (risk of falling down ice-covered steps does not constitute a special aspect). Had plaintiff simply watched her step, any risk of harm would have been obviated. *Spagnuolo v Rudds #2, Inc*, 221 Mich App 358, 360; 561 NW2d 500 (1997).

Affirmed.

/s/ Helene N. White
/s/ Henry William Saad
/s/ Christopher M. Murray